

Response to Comments on
MARCH 2001 PROPOSED AMENDMENTS TO
ISDS REGULATIONS
April 19, 2001

On March 14, 2001 DEM issued a public notice on proposed amendments to the “Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems.” The purpose of the amendments is to clarify the applicability of the site evaluation test requirement at sites that have previously accepted groundwater table data. In addition, the amendments establish a means for sizing an ISDS using the soil physical properties identified in a site evaluation, in lieu of the percolation test method.

DEM held a public workshop to review and discuss the proposed amendments on March 22, 2001 in which 7 people attended. Six people were in attendance for the public hearing held on April 12, 2001. Comments were received from three individuals and representatives of the following: Rhode Island Builders Association, Save the Bay, and the US Environmental Protection Agency.

The comments and DEM’s response are arranged in numerical order by section of the regulations. The comments are either quoted directly from written testimony or they have been summarized by DEM.

[1] 2.01(b)(1) – The existing regulations requiring that all new systems conduct a site evaluation have been postponed by an Emergency Amendment promulgated by DEM on January 11, 2001. The Emergency Amendment expires on May 10, 2001. This section of the amendments specifies under what circumstances a site evaluation will not be required for an application for a new system if the applicant has valid field data.

A comment was received from Save the Bay objecting to “...DEM’s refusal to immediately require soil evaluations to support an ISDS application for a permit for new construction.”

In contrast, two individuals and the RI Builders Association commented that a requirement for a site evaluation on any site with valid field data collected after January 1, 1992 is inconsistent with RIGL 23-19.5.

In addition to the objections raised in the comments above, the US Environmental Protection Agency submitted a letter of support for section 2.01 of the amendment.

The amendment represents a best compromise that was discussed at length in the DEM ISDS Task Force Regulatory Workgroup meetings to move forward with new and better methods, based on updated science and technology for siting and design of septic systems versus the added cost to conduct the new evaluation procedure on a site when an expenditure has already been made to gather the minimum data previously required. DEM Office of Legal Services has concluded that DEM does have authority under RIGL 23-19.5 to require additional test data (see attached letter from Gregory S. Schultz to James M. Sloan, III, March 12, 2001).

[2] 2.01(b)(1)—“During workshops and the public hearing on the February 2000 Amendments to the Regulations, which established soil evaluation testing, it was stated by representatives of the Department that the new soil evaluation test would only be required for new sites which did not have previously approved and valid field data.”

DEM is not aware of any such statement made in the administrative record of the February 2000 rule change, nor do DEM personnel recall such point being made. Notwithstanding, the amendment exempts many sites previously tested from the site evaluation requirements.

[3] 2.01(b)(1)(A) – This section exempts subdivisions from the site evaluation requirement provided that the field data was collected on or after July 21, 1987. Comment: “...it is inappropriate to forever exempt subdivisions...”

DEM feels that the information submitted for review for a “Certification of Subdivision Site Suitability” is much more extensive than that submitted for individual lots and provides sufficient information necessary to adequately assess site conditions. Note that field data that is older than 5 years must be recertified by a licensed designer.

[4] 2.01(b)(1)(B) – The amendment exempts the requirement for a site evaluation for applications with valid field data collected on or after July 21, 1987 for a period of one year after the effective date of the amendment. Comments: (1) “...all systems that were approved by DEM as having a valid groundwater data prior to January 1, 1993 (the date where since DEM is confident that the data is generally conservative), must have a new groundwater table determination based on the latest scientific information available” (2) “The proposal of the one-year window for any person to design a system without performing a soil analysis is unreasonable.”

DEM determined that one-year was a reasonable window of opportunity for individuals with previously approved data to move forward with permitting without being delayed by the site evaluation procedures, given that they may have been under the impression that their field data was sufficient based on previous practices.

[5] 2.01(b)(1)(D)(ii) and (iii) – The exemptions in the amendment for conducting the site evaluation where the applicant has valid field data do not apply to applications where the field data is more than five years old and the approved water table is less than four feet or the test data was collected in a sensitive area (as defined in the amendment). Comments were received that a site evaluation in these sites or any site where test data has been previously collected “..would not provide substantive additional information for the design of a new ISDS.”

The benefits of the site evaluation process over previous methods was addressed during previous rule changes and their administrative procedures. DEM believes that these benefits are particularly important in areas not exempt in (ii) and (iii), which are the areas with the highest risk of ISDS causing environmental or public health hazards.

[6] 2.01(b)(1)(D)(ii) and (iii) – Comment: “This section should contain much broader requirements and require a soil evaluation in all areas that have been identified as nitrogen sensitive”

DEM feels that the areas requiring a site evaluation in (ii) and (iii) are those areas that due to risk to public health and the environment justify further data collection. Data collected from a site evaluation will not result in system design that will limit the input of nitrogen to the subsurface. This can only be done by requiring denitrification technologies in these nitrogen sensitive areas. This issue is being addressed in development of the summer 2001 ISDS amendments.

[7] 10.07(5) – This provision states: “The fastest percolation rate allowed for applications for new systems submitted after the effective date of these regulations shall be 10 minutes per inch.” Comment: “Since 2-5 minute rates will no longer be allowed, why are they still published...?”

This amendment only applies to new systems. Less than 5 minutes per inch can be used for repairs and alterations.

[8] 10.07 – Comment: “When a percolation rate is run, is it still permissible to interpolate and size accordingly...is this flexibility allowed when using soil-based sizing?”

When a percolation test is conducted, the applicant may interpolate. No such flexibility is allowed with soil-based sizing, although there is some variability in interpretation of the soil physical properties that indirectly would affect the selection of the sizing criteria..

[9] 15.05(a) – Comment: “...soil evaluators are the only class of professionals intended to be allowed by the regulations to determine the elevation of the groundwater table.”

The amendment allows licensed designers to recertify previously collected data. DEM intends to clarify in the summer 2001 amendments that only soil evaluators will be allowed to determine the groundwater elevation for new applications to the Department.

[10] 26.01(a)(1) – Comment: “ ‘No greater than 5 feet’ must be replaced by ‘no less than 5 feet.’ ”

The amendment has been changed as follows: “The observation pits shall be excavated to a depth of 5 feet, unless site conditions prevent doing so, in order to allow...”

[11] 26.01(d)(1) – Comment that the proposed amendment does not account for current ISDS construction practice to remove the A and B horizons. For example, the proposed language required that systems with the bottom of the stone above the original grade, the percolation rate is to be determined by the soil category with the slowest rate within 3 feet of the original ground surface. However, there may be no natural soil within this 3 feet.

The amendment was changed to include the following:

“(3) If no natural soil will remain within the 3 feet referenced in 26.01(d)(1) and (2) above, use the percolation rate of the first naturally occurring soil horizon below that depth.”

[12] 26.01(d) – Comment regarding soil-based sizing table: “...it does not cover all possible situations and some flexibility must be given to the Class IV Soil Evaluator. Soil evaluations should *not* be performed based on attempts to match all soils with this chart, although I agree the chart will cover the majority of RI soils.”

It was determined by a group of the state's soils experts from the University of Rhode Island and the USDA Natural Resources Conservation Service that this chart is appropriate for its intended use, and it contains all the major soil categories expected to be found in Rhode Island. If experience with the soil evaluation procedures shows that soil categories are missing, soil categories may be added.

[13] The following comments were received that are all beyond the scope of these amendments. They will all be addressed in the summer 2001 amendments.

- References to "groundwater table" be consistent throughout the regulations and that the phrase "seasonal high" not be used.
- Where the receiving soil allows for rapid movement of effluent, the separation distance from the bottom of the stone to the water table should be increased.

[14] A comment was received that DEM is in not in compliance with RIGL 42-35, Administrative Procedures, in regards to a "statement of need" and "economic impact statement on small business."

RIGL 42-35-3 states that "(a) Prior to the adoption, amendment, or repeal of any rule the agency shall:

"(3) Demonstrate the need for the adoption, amendment, or repeal of any rule in the record of the rulemaking proceeding."

Although a "statement of need" is not specifically required by RIGL 42-35, DEM feels that the record of the rulemaking proceeding, which is not complete until filing with the Secretary of State, clearly "demonstrates the need." This demonstration is evidenced by:

- Minutes of the ISDS Task Force Regulatory Workgroup
- Administrative record for adoption of the Emergency Amendment on January 11, 2001
- Letter of April 11, 2001 from Russell Chateaufneuf to James Sloan, III, representing the Rhode Island Builders Association, in response to a letter from Mr. Sloan to Gregory S. Schultz, DEM Legal Counsel date March 22, 2001.

"(4) Determine whether such action would have a significant adverse economic impact on small business or any city or town."

Such a statement is provided in the official file for the amendments.